No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR A REHEARING

H. W. HUTTON,
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Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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To the Honorable the above-entitled Court, and to the Judges thereof:

Harry Oliver, the plaintiff in error, respectfully petitions for a reconsideration of the above cause, and for reasons therefor presents the following:

The United States Constitutional Convention discussed Sub. 10 of Sec. 8, Ar. 1 of the U. S. Constitution at some length before its final adoption by it, and the proceedings show that the discussion was had and the law as it now stands passed for the very purpose of preventing the *designation* of felonies on the high seas, but for the purpose of enforcing the *definition in detail* of such felonies by Congress. The articles of Confederation said:

> "The United States in Congress assembled, shall have the sole and exclusive right and power of appointing courts for the trial of piracies on the high seas."

That language, of course, was inadequate for all required purposes, and when the matter came before the convention several propositions were introduced, amended, and the law eventually reached the stage of reading "To declare the law of piracies and felonies committed on the high seas."

The following then occurred:

> "Mr. Gouverneur Morris then moved to strike out 'to declare the law' and insert 'punish' before 'piracies' and this motion prevailed. The sentence then read, 'To punish piracies and felonies committed on the high seas, etc.' Mr. Madison and Mr. Randolph then moved to insert 'define and' before 'punish.' This caused debate in the Convention. Mr. Wilson thought 'felonies' *was sufficiently defined by common law,* and Mr. Dickinson agreed with him. Mr. Mercer favored the amendment. *Mr. Madison said felony at common law was vague. It was also defective.* Mr. Gouverneur Morris said he would prefer *designate* to *define.*"

The language then passed coupled with some other offenses, and the whole matter went to the committee on style and was reported back with the other offenses segregated and it was reported back to read

> "To define and punish piracies and felonies committed on the high seas, and *punish* offenses against the law of nations,"

and in that form adopted.

Afterwards Mr. Morris moved to strike out the word "punish" before the words "offenses against the law of nations," so as, he said, to let these be definable as well as punishable, by virtue of the preceding member of the sentence. Mr. Wilson hoped the alteration would not be made, as he thought it would look like arrogance to attempt to define the law of the whole civilized world. Mr. Morris replied:

> "That the word define is proper when applied to offenses in this case; the law of nations being often too vague and deficient to be a rule."

The motion then passed by a vote of six states against four.

Mr. Madison said upon this section:

> "The provision of the Federal Articles on the subject of piracies and felonies, extends no further than to the establishment of courts for the trial of these offenses. The definition of piracies might, without inconvenience, be left to the law of nations, though a Legislative definition of them is found in most municipal codes. *A definition of felonies on the high seas, is evidently requisite. Felony is a term of loose signification, even in the common law of England,* and of various import in the statue law of that kingdom. *But neither the common, nor Statute law of that, or of any other nation, ought to standard for the proceedings of this,* unless previously made its own by legislative adoption. The meaning of the term, as defined in the codes of the several States, would be as impracticable as the former would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the states; and

> varies in each with every revision of its criminal laws. For the sake of certainty and uniformity, therefore, the power of defining felonies in this case was in every respect necessary and proper." Watson on the Constitution, Vol 1, pages 670-675.

It will be thus very clearly seen what the Convention intended, what they did is clear, they said felonies must be *defined* not *designated* by name, and violence is done to language, when it is said you can define by using a term of a known and determinate meaning, that is creating a crime by name or designation, exactly what the learned men in the constitutional convention tried to, and, unquestionably by their language did prevent.

We will now respectfully call the Court's attention to the Smith case, that was a case of piracy, and unquestionably intended by the U. S. Supreme Court *to apply to cases of piracy, and not to felonies.*

We find in it the following language:

> "And it has been very justly observed, in a celebrated commentary that the definition of piracies might have been left, without inconvenience, to the law of nations, though a legislative definition of them is to be found in most municipal codes."

That language is found above in the remarks of Mr. Madison; what follows is:

> "A definition of felonies on the high seas, is evidently requisite."

In the Smith case the language was:

> "That if any person or persons whatsoever shall upon the high seas commit the crime of piracy *as defined by the law of nations.*"

In this case the language is:

> "Whoever shall commit the crime of rape shall suffer death."

The laws are not similar. If the law in the Smith case had read:

> "Whoever shall commit the crime of piracy shall suffer death"

it would be like this case, and if the law in this case read:

> "Whoever shall commit the crime of rape as defined by the common, or some other law," naming it, it would be like the Smith case.

The source of certainty is pointed out in the Smith case, to wit the law of nations, of which courts take *judicial knowledge;* this Court cannot take judicial knowledge of the common criminal law, and how can it be said that the facts stated in the indictment in this case constitute rape at common law? If they did, where do we arrive?

All the courts of the United States have held that they have no common law jurisdiction; this Court properly held in *Peters* vs. *United States,* 36 C. C. App. 105:

> "It must be borne in mind that the national courts do not resort to common law as a source of criminal jurisdiction. Crimes and offenses

> under the authority of the United States can only be such as are expressly designated by law. It devolves upon Congress *to define* what are crimes, to fix the proper punishment, etc."

So we cannot go to the common law for certainty; where then can we be made certain?

And in *U. S.* vs. *Benson,* 70 Fed. 591, 594:

> "But the national courts resort to the common law as a source of criminal jurisdiction. It devolves upon Congress *to define what are crimes,* to fix their punishment and to confer jurisdiction for their trial. (Cases cited.) We must therefore *look elsewhere than to the common law* for the test to be applied which shall determine the validity of the indictment."

To supplement that language, we add that the *common law of crimes, never at any time applied on the high seas.*

So where is the oasis in the desert of uncertainty created by the mere naming of a crime, as in this case? We cannot go to the common law for certainty; where then can we be made certain? Where is the prohibited act, *the crime that Oliver was convicted of to be found?*

Again in the Smith case, the Court expressly finds that piracy is sufficiently defined by the law of nations.

It is proper it should be so defined, *piracy is an international offense,* such an offense as other nations might be interested in, and no nation should

arrogate to itself the right to define it without consulting other nations, as was well said by Mr. Wilson in the constitutional convention when this article of the Constitution was under discussion.

> "Mr. Wilson hoped the alteration would by no means be made. To pretend to *define* the law of nations, which depended on the authority of all the civilized nations of the world, would have a look of arrogance that would make us look ridiculous."

We now call the Court's attention to the language in the Smith case, following the language quoted therefrom in this case:

> "It is next to be considered, whether the crime of piracy is defined by the law of nations, etc."

And the Court then proceeds and shows that it has been so defined.

We now respectfully call the Court's attention to the fact that Judge Story, the writer of the decision in the Smith case, himself was of the opinion that felonies *must be defined by Congress,* and that a different rule related to piracies.

In *Story on the Constitution*, written in 1833, about 13 years after the Smith case was decided, we find:

> "Sec. 1159. If the clause of the Constitution *had been confined to piracies,* there would not have been any necessity of conferring the power to define the crime, since the power to punish

would necessarily be held to include the power of ascertaining and fixing the definition of the crime. Indeed, there would not seem to be the slightest reason to define the crime at all; for piracy is perfectly well known and understood in the law of nations, though it is often found defined in mere municipal codes. By the law of nations, robbery or forcible depredation upon the sea, *animo furandi*, is piracy. The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the universal law of nations; a pirate being deemed an enemy of the human race. The common law, therefore, deems piracy to be robbery on the sea: that is, the same crime which it denominates robbery when committed on land. And if Congress had simply declared that piracy should be punished with death, the crime would have been sufficiently defined. Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term; for that is certain, which by reference, is made certain. If Congress should declare murder a felony, nobody would doubt what was intended by murder. And, indeed, if Congress should proceed to declare that homicide 'with malice aforethought' should be deemed murder and a felony, there would still be the same necessity of ascertaining, from the common law, what constituted 'malice aforethought'; so that there would be no end to difficulties or definitions, for each successive definition might involve some terms which would still require some new explanation. But the true intent of the Constitution in this part, was, not merely to define piracy as known to the law of nations, but to enumerate what crimes in the national code should be deemed piracies. And so the power has been practically expounded by Congress."

Judge Story never intended the foregoing language to apply to any but a piracy case, as appears by the next section, as follows:

> "1160. But the power is not merely to define and punish piracies, but *felonies,* and *offenses against the law of nations;* and on this account, *the power to define,* as well as to punish, *is peculiarly appropriate.* It has been remarked, *that felony is a term of loose signification,* even in the common law; *and of various import* in the statute law of England, etc.
>
> Sec. 1162. But whatever may be the true import of the word 'felony' at the common law with reference to municipal offenses, *in relation to offenses on the high seas its meaning is necessarily indeterminate;* since *the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law.* Lord Coke long ago stated that a pardon of felony would not pardon piracy, for 'piracy, or robbery on the high seas, was no felony whereof the common law took any knowledge, etc., but was only punishable by the civil law, etc.; the attainder by which law wrought no forfeiture of lands or corruption of blood.' And he added, that the statute of 28 Henry 8, Ch. 15, which created the high commission court for the trial of 'all treasons, felonies, robberies, murders, and confederacies committed in or upon the high seas,' etc., did not alter the offense felony, but left the offense as it was before the act, viz. felony only *by civil law.*
>
> Sec. 1163. Offenses against the law of nations are quite as important, and cannot with any accuracy be said to be completely ascertained and defined, in any public code recognized by the common consent of nations. *In respect,* therefore, *as well to felonies on the high seas, as to offenses against the law of nations,* there

> is a peculiar fitness in giving to Congress the power to define, as well as to punish. And there is not the slightest reason to doubt, that this consideration had very great weight with the convention in producing the phraseology of the clause. On either subject it would have been inconvenient, if not impracticable, to have referred to the codes of the States as well from their imperfection as their different enumeration of the offenses. *Certainty, as well as uniformity, required that the power to define* and punish *should reach over the whole of these classes of offenses.''*

It is clear from the foregoing, that the farthest Judge Story went is as follows:

1st. He held that a reference to the law of nations was a sufficient definition of piracy.

2nd. That the common law never applied to offenses committed on the ocean.

3rd. That offenses committed on the ocean were governed and controlled entirely by the civil law.

4th. That *felonies* and offenses against the law of nations *must be defined, or no crime existed.*

What the decision states, as quoted by the Court in this case, is dictum. It will be noted that the Smith case does not mention the cases of *U. S.* vs. *Hudson,* 7 Cranch 31, and *U. S.* vs. *Coolidge,* 1 Wheaton 415. And they were not overruled by the Smith case.

Neither of those cases was a piracy case, and in both the Supreme Court decided that in the absence of a definition of the crime, the crime did not exist.

We also respectfully call the Court's attention to the fact that piracy became an obsolete offense about the time the Smith case was decided; there has been no opportunity of any review of it as a piracy case. It has unquestionably been overruled, however, by the language of other cases. See those cited in our brief, and the following, among other language quoted:

Tennessee vs. *Davis,* 100 U. S. 275.

> "That the legislative authority of the Union must *first make an act* a crime, affix a punishment to it and prescribe what courts have jurisdiction of such an indictment."

The last expression of opinion of the United States Supreme Court on the absolute requirement of a statutory definition of crime, is found in

In re George, 228 U. S. 14-22.

That Court saying on page 22:

> "Where the charge is of crime it must have clear legislative basis."

We submit that that language does not permit the creation of a crime by designation.

Certainty is what all persons are entitled to in a criminal case, everyone has a right to know whether he is committing a crime or not, as we have asked heretofore where are we to ascertain what constitutes rape in this case? According to Lord Coke and Judge Story, common law crimes never existed and were never recognized on the high seas; the

civil law were. Again the United States Courts do not recognize common law crimes. Of what crime then was Oliver convicted? Where are we to find the civil law definition of rape? And does the indictment set forth the facts required by the civil law? There is no proof that it does, or that there was any such crime at civil law.

We have taken the liberty of writing very fully on this subject, for the reason that we believe this is a case of great importance, if one offense can be created by designation and not defined, all others can be designated by name likewise. Suppose the whole criminal law read about as follows:

Whoever shall commit the crime of white slavery, shall be punished, etc.

Whoever shall commit the crime bribery, shall be imprisoned, etc.

Whoever shall commit the crime of smuggling, shall be imprisoned, etc.

Whoever shall commit the crime of counterfeiting, shall be imprisoned, etc.

What condition would the criminal code then be in? It was the intention of the Constitution framers to have the act defined. The foregoing extracts show the necessity for such intention, and we respectfully submit that it would be establishing a very dangerous precedent for any decision to stand that would place the criminal law in the state of uncertainty

that existed for centuries, centuries ago, when in some instances as has been stated, criminal laws were printed on high rocks and places where no one could read them. In the case at bar, a similar state of uncertainty exists.

In the trial of criminal cases, it sometimes happens that the true facts of a case are not developed, particularly in a case where none but the accuser and the defendant are the only material witnesses, the writer of this petition, together with others, able and disinterested parties, that have since Oliver's trial investigated this case fully, are confident that while the evidence in this may have justified the verdict, that Oliver is being punished for a crime that he never committed. And for that reason the writer feels a deep interest in the results of his case.

We respectfully submit that this petition for a reconsideration of the case should be granted.

Respectfully,
H. W. Hutton,
Attorney for Petitioner.

I hereby certify, that, in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

H. W. Hutton,
Attorney for Petitioner.